

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)	
)	
v.)	Crim. No. 03-57-B-W
)	
TYLER RAY KINNEY,)	
)	
Defendant)	

**RECOMMENDED DECISION ON
MOTION TO DISMISS THE INFORMATION**

Defendant Tyler Kinney is charged in an information alleging that he knowingly possessed a firearm in and affecting commerce in violation of 18 U.S.C. § 922(g)(9), Kinney having been previously convicted of a Maine misdemeanor crime of domestic violence. On September 29, 2003, Kinney filed a motion to dismiss the information, alleging that he had not waived his right to counsel or his right to a jury trial. (Docket No. 10.)¹ Following the First Circuit's decision in United States v. Hartsock, 347 F.3d 1 (1st Cir. 2003), Kinney obtained leave of court to supplement his original motion to dismiss. (Docket Nos. 15, 16 & 18.) I issued an order requiring counsel to notify the court by December 11, 2003, if an evidentiary hearing was sought on the motion to dismiss. (Docket No. 19.) Neither the United States nor the defendant requested such a hearing be held. Based upon the record before me, I now recommend that the Court **DENY** the motion to dismiss.

¹ The First Circuit has not definitively answered the question of whether the issue of waiver is a legal issue decided by the Court prior to trial or a factual issue decided by the factfinder during trial, but seemed to suggest that United States v. Bartelho, 71 F.3d 436 (1st Cir. 1995) perhaps requires the decision to be made by the court. See United States v. Hartsock, 347 F.3d 1, 3 n.3 (1st Cir. 2003) (describing the question as "not trivial," but noting that all courts to have considered the issue have determined that it is a legal issue). Defendant's counsel acknowledges this footnote in his supplemental memorandum, (Docket No. 16 at 2 n.1), but concedes, for purposes of this motion, that case law strongly indicates, and in fact appears to require, that the matter be decided by the court.

The meaning of a “misdemeanor crime of domestic violence” for purposes of 18 U.S.C. § 922(g)(9) is fully defined under 18 U.S.C. § 921:

(33)(A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that--

- (i)** is a misdemeanor under Federal or State law; and
- (ii)** has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

(B)(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—

(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and

(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either

(aa) the case was tried by a jury, or

(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

¹ So in original. No subparagraph (C) was enacted in subsec. (a)(33).

18 U.S.C. § 921(a)(33) (footnote in original).

On February 12, 1997, Kinney pleaded guilty to assaulting his wife and was sentenced to pay a \$200 fine. The record does not suggest there is any dispute that Kinney was convicted of a misdemeanor crime of domestic violence. In light of the First Circuit’s decision in Hartsock, the burden of persuasion is on Kinney to prove that his

conviction is within the subsection (33) exception. In other words, Kinney must convince me that he did not intelligently and knowingly waive his right to counsel and/or his right to a jury trial when he pleaded guilty in 1997.

In the present case the presiding state court judge made the following explicit finding:

I'm going to allow you to [proceed without a lawyer], and my judgment is that you're making that decision knowingly and intelligently. This is a charge of a Class D crime of assault, and the allegation is that on January 18th of this year, at Mars Hill, that you intentionally, knowingly, or recklessly caused bodily injury or offensive physical contact to Cindy Kinney.

(Feb. 5, 1997, Arraignment Tr. at 7-8.) The plea inquiry ensued.

Prior to making this finding, the state court judge had advised Kinney of his right to have an attorney and to have one appointed if he could not afford to retain his own counsel. He had also advised Kinney that he could receive a potential jail sentence if convicted. Finally, the state court judge explained to Kinney that if he wanted a jury trial he would have to make a written demand for one within twenty-one days of the arraignment date. The judge did not make an explicit finding of an intentional and knowing waiver of the right to jury trial, but the same arraignment transcript shows that the state court judge fully complied with the Maine Rules of Criminal Procedure 5(d)(2) and 22(a), rules that work in concert to create a “binding inference of waiver” of the constitutional right to jury trial. See State v. Holmes, 2003 ME 42, ¶¶ 8- 9, 818 A.2d 1054, 1057 (effective waiver of jury trial right requires the District Court judge, under Maine Rule of Criminal Procedure 22(a) to administer the rule in a manner the ensures each defendant is fully aware: (1) of his or her right to a jury trial; (2) of how to secure a jury trial; and (3) that failing to make a timely request constitutes a waiver of this right).

The record evidence clearly establishes that Kinney was advised of his right to both a lawyer and a jury, but nevertheless he pleaded guilty. Kinney has failed to persuade me that his record waivers were not intelligently and knowingly made. While Kinney points to perceived inadequacies on the judge's part in the arraignment and subsequent change of plea colloquy, he presents nothing suggesting that he did not understand that he was giving up his right to have twelve people decide his guilt when he failed to file the written jury demand. Nor does he suggest that he did not understand the disadvantages of self-representation.

The circumstances surrounding this guilty plea suggest that Mrs. Kinney, the alleged victim, received no physical injuries as a result of the altercation and wanted the charges against her husband dismissed. The State refused to dismiss the charges. Kinney described the events as an argument that resulted in both spouses being in an "uproar." (Feb. 12, 1997, Plea Tr. at 3.) The sentence of a \$200.00 fine suggests that the judge accepted Kinney's representations at least to some extent.

Kinney pleaded not guilty on February 5, 1997, and was given a trial date of March 5, 1997, plus informed that he could request a jury trial by making written demand within twenty-one days of February 5. On February 12, 1997, Kinney made an unscheduled appearance back before the same District Court Judge in order to change his plea. It seems that at least part of the motivation for the unscheduled appearance was Mrs. Kinney's desire to have the bail conditions modified in order to allow Kinney to return to the home. Entering a plea of guilty would eliminate the bail conditions. Nothing suggests that Kinney lacked understanding regarding his right to counsel or his right to jury trial. In fact, a fair read of the circumstances would be that he wanted to put

the entire matter behind him as quickly and efficiently as possible. Those facts do not support a finding that Kinney did not knowingly and intelligently waive his right to counsel and his right to a jury trial.

Conclusion

Based upon the foregoing, I recommend that the Court **DENY** the motion to dismiss the information.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated December 19, 2003

**U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:03-cr-00057-JAW-ALL
Internal Use Only**

Case title: USA v. KINNEY

Other court case number(s): None

Date Filed: 09/04/03

Magistrate judge case number(s): None

Assigned to: JUDGE JOHN A.
WOODCOCK JR.

Referred to:

Defendant(s)

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ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts

18:922G.F - POSSESSION OF
FIREARM AFTER
CONVICTION OF
MISDEMEANOR CRIME OF
DOMESTIC VIOLENCE - 18
USC Sec. 922(g)(9)
(1)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

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None

Complaints

None

Disposition

Plaintiff

USA

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